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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

TO: The Commission

OPPOSITION TO MOTION FOR STAY PENDING JUDICIAL REVIEW

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby opposes the "Request for Stay Pending Judicial Review" [hereinafter "Stay Request"] filed by U S West, Inc. ("U S West") in the above-captioned proceedings on September 9, 1997. U S West seeks to block the Commission's clarification in the Third Order on Reconsideration (FCC 97-295) that incumbent local exchange carriers ("ILECs") must provide shared transport to requesting carriers as an unbundled network element pursuant to Section 251(c)(3) of the Telecommunications Act of 1996 ("1996 Act").

The Stay Request is part of an ongoing series of actions by U S West and other ILECs to prevent local competition from developing in the United States, contrary to the express provisions of the 1996 Act and Congress' intentions. In this case, U S West is seeking to make entry prohibitively expensive by forcing competitive local exchange carriers

to purchase transport facilities and capacity they do not need as a precondition for local market entry through network elements. The only support U S West can muster for its anti-competitive plan is a facile misinterpretation of the recent decision by the U.S. Court of Appeals for the 8th Circuit in Iowa Utilities Board v. FCC, Nos. 96-3321, et al. ["Iowa Utilities Board"]. The Commission should reject U S West's misplaced reliance upon that decision and deny the Stay Request.

I. U S WEST IS UNLIKELY TO SUCCEED ON THE MERITS

A. Distinguishing Sections 251(c)(3) and 251(c)(4).

U S West argues that shared transport cannot be a network element because it does not reflect the risk disparity between unbundled network elements and local exchange resale which it construes Iowa Utilities Board to require. However, the reading of the 1996 Act and the Iowa Utilities Board decision proffered by U S West is completely wrong.

U S West's fundamental premise -- that every unbundled network element must reflect higher risks than if the requesting carrier purchased *that element* as a service from the ILEC -- is wrong. That requirement applies only for network elements or combinations of elements that are the functional equivalent of the ILECs' actual finished retail services subject to the local exchange resale obligations under Section 251(c)(4). For network elements or combinations of elements that are not the functional equivalent of the ILECs' actual finished retail, the statutory distinction between network elements and local exchange

resale is not an issue and there is no reason to examine the level of risk assumed by the entrant.

In this case, the question is whether the ILECs offer a shared transport service subject to the resale obligations in Section 251(c)(4). That provision requires ILECs to offer at wholesale rates "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4). It is undisputed that shared transport between ILEC switches is not the functional equivalent of any ILEC service satisfying that definition. Shared transport is a wholesale service offered to carriers, not a retail service offered to end-user subscribers.[1] Consequently, the Commission's clarification that shared transport is a network element does not in any way implicate the distinction between Sections 251(c)(3) and 251(c)(4) in the 1996 Act.

The Iowa Utilities Board decision does not require otherwise. The Court held that when a new entrant uses a combination of network elements to provide telecommunications services in competition with the ILECs' finished retail services, the greater risks of providing such services through a combination of network elements fully preserves the distinction between Sections 251(c)(3) and 251(c)(4). The Court stated: "A carrier providing services through unbundled access . . . must make an up-front investment that is large enough to pay for the cost of acquiring access to *all* of the unbundled elements of an incumbent LEC's network that are necessary to provide local telecommunications services." Iowa Utilities Board at 144 (emphasis supplied). The Court required the network element combination to

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[1] Similarly, in its initial Report and Order in this proceeding, the Commission concluded that exchange access services are not subject to the local exchange resale obligation under Section 251(c)(4). Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15934-35 (1996).

reflect heightened risks; the Court did not require each network element standing alone to reflect heightened risks.

In this case, shared transport cannot be used to provide a telecommunications service that is the functional equivalent of an ILEC's finished retail service unless it is combined with unbundled local switching and local loops. As a result, the relevant question is whether a new entrant who has purchased all three elements in order to provide a competing telecommunications service has incurred risks that it would not have to incur were it to purchase the functionally equivalent service on a resale basis pursuant to Section 251(c)(4). The undisputed answer to that question is yes, regardless whether the entrant purchases shared or dedicated transport. The purchase of local loops and local switching requires the new entrant to accept a higher degree of commercial risk than entering the local market through resale. Even if a new entrant does not incur similar risks when it purchases shared transport, it would not alter the fact that the new entrant incurs such risks for the combination of network elements necessary to provide a competing telecommunications service.

Lastly, CompTel disputes that new entrants who purchase shared transport at cost-based rates would not incur additional risks beyond what they would incur as resale entrants. In U S West's region, local service often is priced on a flat-rated basis and new entrants presumably will offer competing flat-rated products. In those regions, resale entrants would purchase the underlying service from U S West at a flat rate, while a new competitor entering through network elements would pay a usage-based rate for shared transport. Anytime a carrier sells a product at a flat rate while paying usage-based rates for the

underlying capacity or functions, a level of risk is created that is not borne by the carrier who decides to enter the market through local exchange resale. Therefore, U S West is wrong both that each individual network element must reflect heightened risk compared to purchasing that element on a resale basis, and that new entrants who purchase shared transport on a usage sensitive basis do not incur heightened risks compared to purchasing the entire service on a resale basis from the ILECs.

B. Section 51.315(b).

U S West takes issue with the Commission's application of Section 51.315(b) of the Commission's rules to require ILECs to provide network element combinations which the ILECs currently combine. That argument need not detain the Commission long. The Court upheld that provision in Iowa Utilities Board, and several ILECs, including U S West, have asked the Court to vacate that provision on rehearing. It is inappropriate for U S West even to request a stay of a rule when the Court whose decision the rule is alleged to flout has upheld the rule and currently has the issue before it again on rehearing.

II. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST DO NOT SUPPORT GRANTING A STAY

U S West and other ILECs have successfully evaded complying with the local competition provisions in the 1996 Act for more than 18 months. U S West is so far from complying with the statute that it has yet to initiate even one Section 271 hearing in any state in its region. Its evident goal is to erect as many roadblocks as possible to ensure that it never has to compete in the local market within its region. If U S West succeeds in its

attempt to force potential competitors to purchase transport facilities and capacity they do not need as a precondition of market entry, it will have created a nearly insuperable barrier to local entry via network elements. The overriding public interest in the development of local competition mandates denial of the Stay Request.

U S West's attempt to invoke universal service concerns is unavailing. Congress adopted Section 254 of the 1996 Act to ensure that universal service will be fully protected and promoted through explicit subsidy mechanisms. U S West's desire to protect the implicit subsidies it claims (without support) are built into its local service rates should not be permitted to slow implementation of the statutory mandate in favor of local competition. To the extent U S West believes that it requires flexibility to rebalance local rates, it should take up that matter with relevant state authorities. There is no legal or equitable basis for adopting a moratorium on local competition through network elements under the 1996 Act until such time as all alleged local cross-subsidies are converted to explicit recovery mechanisms. The Commission itself has found that "the availability of [unbundled network elements] at rates that exclude subsidies [is] unlikely to have dramatic short-term impact on the ability of price cap LECs to fulfill their universal service obligations." See Access Charge Reform, CC Docket Nos. 96-262 et al., FCC 97-216, rel. June 18, 1997, at ¶ 20 (order denying motions to stay access reform order). Nor is there any basis to assume that state authorities would refuse to take any actions that might be necessary to reconcile local competition with universal service.

U S West's claim of irreparable harm is little more than a plea for protection against competition. Even with the Commission's clarification that new entrants may use shared

transport to provide telecommunications services through network elements, it will take many months before new entrants are able to introduce any such services in the local market in U S West's region. During that time, U S West will be free to seek local pricing flexibility from state authorities. The Commission has no basis to presume that U S West needs additional pricing flexibility, or that state authorities would deny it such flexibility unreasonably. To the extent U S West loses customers to competitive new entrants who purchase shared transport, it will be due to the competitive process that Congress meant to facilitate rapidly through adoption of the 1996 Act. It is well established that losses due to lawful competition cannot constitute irreparable harm. E.g., Central and Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 308 (D.C. Cir. 1985).

Irreparable harm would occur only if the Commission were to *grant* the Stay Request, which would deprive customers in U S West's region of any significant choice among local service providers for a still longer period of time. The flip side of U S West's unapologetic attempt to insulate its customers from new entrants is that those customers will continue to be captive to U S West and forced to pay higher rates than they would pay in competitive market conditions. Those losses will never be regained by U S West's customers. While U S West may not acknowledge any benefits from lower prices and more carrier choices for its subscribers, the public interest in maximizing full local competition at the earliest possible time is a compelling reason to deny the Stay Request.

Conclusion

For the foregoing reasons, the Commission should deny U S West's Stay Request.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: _____
Robert J. Aamoth
KELLEY DRYE & WARREN, LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

Genevieve Morelli
Executive Vice President and
General Counsel
THE COMPETITIVE
TELECOMMUNICATIONS ASSOCIATION
1900 M Street, N.W., Suite 800
Washington, D.C. 20036
(202) 296-6650

September 22, 1997

CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that I have served a copy of the foregoing "Opposition to Motion for Stay Pending Judicial Review" on this 22nd day of September, 1997, upon the following parties by hand:

Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

A. Richard Metzger, Jr.
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

Thomas Boasberg, Jr.
Federal Communications Commission
Room 814
1919 M Street,N.W.
Washington, DC 20554

James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

John Nakahata
Federal Communication Commission
Room 650-K
1919 M Street, N.W.
Washington, DC 20554

Paul Gallant
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

Kathleen Franco
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

William E. Kennard
Federal Communications Commission
Room 614
1919 M Street, N.W.
Washington, DC 20554

James Casserly
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

Kathleen Levitz
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

Janice Myles
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

Richard K. Welch
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

Kalpak Gude
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

Michael H. Riordan
Federal Communications Commission
Room 822
1919 M Street, N.W.
Washington, DC 20554

William T. Lake*
John H. Harwood II
Samir C. Jain
David M. Sohn
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420

International Transcription Service, Inc.
1231 20th Street, N.W.
Washington, DC 20036

Marlene Borack

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* Delivery via first class mail, postage prepaid.